No. 78579-1

SANDERS, J. (dissenting)—The majority holds Westlake Center may constitutionally prohibit picketing at Westlake's Seattle Center Monorail (Seattle Monorail) station at Fifth and Pine in downtown Seattle, notwithstanding clear precedent that public transit stations are public forums. Because it is a public forum, Westlake Center's restriction on signs must be narrowly tailored to serve a compelling interest. However, this regulation absolutely prohibits any form of picketing anywhere, anytime, under any circumstance. Furthermore, the prohibition leaves no alternative channel for would-be picketers to express their message. This blanket prohibition violates the First Amendment.

Beth Sanders and William and Patricia Daugaard planned to attend an antiwar protest at Seattle Center. They went to Westlake Center to use the Seattle Monorail. The Daugaards, after seeing the long lines for the monorail, decided to leave the station. As he exited, Mr. Daugaard refused to succumb to repeated commands to lower his protest sign. Beth Sanders decided to ride the monorail and as she waited she held her sign high, peacefully proclaiming her discontent with the war in Iraq. No passengers reported being disturbed or delayed; there were no reports of violence or injuries. Nevertheless, Sanders was eventually forced to lower her sign.

Picketing is a basic and essential means of protest, clearly protected by our right

to free speech. *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) ("Because of the importance of 'uninhibited, robust, and wide-open' debate on public issues, we have traditionally subjected restrictions on public issue picketing to careful scrutiny." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964))); *Carey v. Brown*, 447 U.S. 455, 466-67, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980) ("[P]icketing . . . 'has always rested on the highest rung of the hierarchy of First Amendment values . . . .'" (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963))); *Edwards v. City of Coeur D'Alene*, 262 F.3d 856, 862 (9th Cir. 2001) ("Because the ordinance clearly regulates picketing . . . , the ordinance necessarily regulates expressive activity protected by the First Amendment."). Rather than rigorously scrutinizing Westlake's regulations, as the Supreme Court commands we do, the majority inhibits "robust[] and wide-open debate" on the important public issue of the Iraq war by upholding Westlake's absolute ban on picketing anywhere, anytime on the public easement. *See Boos v. Barry*, 485 U.S. 312, 318, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (citing *New York Times Co.*, 376 U.S. 254).

I. The Seattle Monorail station is a designated public forum

Here the critical determination is whether the monorail station is a public or nonpublic forum. The Seattle Monorail station is akin to a bus or train station; it is an access point for commuters to board onto and disembark from local public transit.

Bus terminals are public forums. *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir. 1968). This easement is merely an extension of the transit station, allowing people access to and from the station.[1]

Wolin concerned Vietnam protestors at a New York Port Authority bus terminal. Some protestors carried placards. The Second Circuit Court of Appeals inquired whether the "character of the place, the pattern of usual activity, the nature of its essential purpose," 392 F.2d at 89, made the terminal a public forum and held:

> The Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. Like a covered marketplace area, the congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum. . . . To deny access to political communication seems an anomalous inversion of our fundamental values.

[1] The bus terminal described in *Wolin* is nearly identical to the forum at issue before us today:

> The Bus Terminal building operated by the Port Authority occupies a full city block in Manhattan. Thousands of persons use the terminal facilities, entering from the subway or through six outside entrances, using the fifty foot wide main concourse and four other levels to get to and from buses, subways, city streets, shops and other concessions. In 1966 the average number of persons passing through the building each day approximated 205,000 and on December 24, 1966 some 325,000 people used the facility. The Terminal contains, in addition to the open concourse areas and waiting rooms, bus line ticket counters, newsstands, restaurants, snack bars, a bakery, a drugstore, a bar, a bowling alley, a bank, gift shops and various other shops and concessions which are open to the general public.

Wolin, 392 F.2d at 85.

Id. at 90 (footnote omitted). *Wolin* has often been cited with approval. *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987); *Jews for Jesus, Inc. v. Bd. of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986); *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1042 (5th Cir. 1982); *Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. 1981); *Business Executives' Move for Vietnam Peace v. Fed. Commc'ns Comm'n*, 146 U.S. App. D.C. 181, 450 F.2d 642, 659 (1971) ("We do not have to decide whether the broadcast medium inherently amounts to a 'public forum' on the order of public streets or parks or meeting halls or even bus terminals."), *rev'd on other grounds*, *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973); *Moskowitz v. Cullman*, 432 F. Supp. 1263, 1266 (D.N.J. 1977) ("The terminal is a building, constructed, owned, operated and maintained by a public authority. It is open to the public, and it is in fact used by thousands of citizens each day as they travel to and from work."); *Toward Gayer Bicentennial Comm. v. R.I. Bicentennial Found.*, 417 F. Supp. 632, 639 n.9 (D.R.I. 1976) ("It could be argued that, while the Old State House is a public forum, it is not as wide open a one as a street, a park, or a bus station. Certainly public access to such a building does not have roots in 'time immemorial,' and the building cannot be considered a mere enclosed public thoroughfare through which large numbers of people pass each day, the way a bus station or even the rotunda of a state capitol building can." (citation omitted)).[2]

[2] To support its holding that the monorail is not a public forum, the majority relies on inapposite authority. In *Krishna*, a plurality of the United States Supreme Court held that

As part of its designated public forum test, the majority asks "whether a '*principal* purpose' of the property is the free exchange of ideas." Majority at 12 (emphasis added). None of the cases the majority cites for its test ever uses the phrase "principal purpose."[3] Rather, *Kokinda* reasoned:

> "[T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum."

United States v. Kokinda, 497 U.S. 720, 726, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (plurality opinion) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund,*

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airport terminals are nonpublic forums. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992). But the Court made clear its holding was guided by the security concerns particular to airports. Such concerns do not bear on our analysis here. Also, the majority cited *City of Seattle v. Eze*, 111 Wn.2d 22, 31-32, 759 P.2d 366 (1988), which held public transit itself is not a public forum. *See* majority at 18. Similarly, the United States Supreme Court held the interior of a city-operated transit vehicle is a nonpublic forum. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974). But we are concerned with what happened outside the monorail. And the monorail station, like a public bus terminal, is a designated public forum.

[3] Later the majority cites *International Society for Krishna Consciousness*, a plurality Supreme Court case that held an airport was not a traditional public forum. Majority at 14 (citing *Int'l Soc'y for Krishna Consciousness*, 505 U.S. 672). This case does use "principal purpose" language but only as dicta in discussing a *traditional* public forum. *Krishna*, 505 U.S. at 679; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.").

Inc., 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)). Therefore, while the location and purpose of government owned property informs the analysis, it is not necessary to find the principal purpose of the monorail station is the free exchange of ideas in order to find it is a public forum. Instead *Kokinda* balances the competing interests. Here the public's interest in free speech substantially outweighs the government's preference to prohibit it.

By holding the easement is a nonpublic forum, the majority potentially stifles all free speech, even innocuous activities such as distributing leaflets or merely posting signs in the public spaces. This is because we must apply the far more deferential reasonableness standard to nonpublic forums, allowing the government to exclude entire classes of speech or regulate speech by its content: "Control over access to a nonpublic forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. Apparently the majority believes this is more appropriate, suggesting a monorail station is more akin to a military base than to a bus terminal. *See Greer v. Spock*, 424 U.S. 828, 838, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976) (holding a military base is a nonpublic forum because it is "the business of a military installation . . . to train soldiers, not to provide a public forum" (alteration in original)).

The majority relies on the easement itself to determine the nature of the rights

involved, as if a private corporation may say what rights we do and don't have when it allows the government to use its land. Majority at 17. The majority concludes the easement is only for the limited purpose of providing pedestrian access to the monorail station since "[a]n easement must be construed strictly in accordance with its terms in an effort to give effect to the intention of the parties." *Id*. But as the Tenth Circuit Court of Appeals found, "a deed does not insulate government action from constitutional review. If government actions taken with respect to the easement violate the Constitution, this simply means the easement terms themselves are unconstitutional and must be altered or eliminated by the involved property owners." *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002) (citation omitted). Nor does "the mere fact the government has an easement rather than fee title . . . defeat application of the First Amendment." *Id*. at 1123 n.5; *see also Cornelius*, 473 U.S. at 801 (finding that public forums may include private property dedicated to public use). People have free speech rights at the monorail station regardless of what the easement does or does not say.

Furthermore, it is immaterial if the easement's principal purpose is to facilitate pedestrian traffic. *See Marsh v. Alabama*, 326 U.S. 501, 506, 66 S. Ct. 276, 90 L. Ed. 265 (1946) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."). The *Wolin* court also found, "the character

and function of the Terminal[] makes clear that it is a thoroughfare used by thousands of people each day. . . . They are in the Terminal for the principal purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit." *Wolin*, 392 F.2d at 89. But this is precisely what makes the bus terminal a public forum. *Id*. (finding the port authority's argument that the purpose of the terminal did not include protesting "evidence[d] too little regard for the vagaries of effective communication, and for the versatility of the First Amendment's proscription"). Similarly, the Ninth Circuit Court of Appeals holds a privately owned sidewalk is also a public forum when "the sidewalk is used 'to facilitate pedestrian traffic in daily commercial life . . . ,' and not merely to provide access to the Venetian for its patrons." *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.*, 257 F.3d 937, 944 (2001) (quoting *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.,* 45 F. Supp. 2d 1027, 1035 (D. Nev. 1999)). Any ordinary sidewalk *principally* provides pedestrian access to particular destinations. Will the majority now further deny public forum status to all sidewalks?[4]

II. Westlake's free speech restrictions are not narrowly tailored to a significant interest

The majority correctly finds Westlake's restrictions are content-neutral, though it incorrectly finds Westlake's restrictions are constitutional. A content-neutral restriction regulates the time, manner, or place of speech and is "'justified without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491

U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)). Westlake mandates all signs "'must be carried low to the ground and close to the body of the person holding the sign,'" at any location and at all times. Majority at 6 (quoting Westlake policy). In other words, irrespective of message, protestors must carefully carry their signs to and from the monorail but may not picket at the monorail station itself or even raise the signs above their heads as they travel.

The test for any content-neutral restriction is whether the restriction in question is narrowly tailored to a significant government interest. *Ward*, 491 U.S. at 798-99. Westlake's restrictions cannot meet this test. While public safety is a "significant interest," prohibiting all picketing is not necessarily tailored narrowly to serve that interest.[5] The majority ignores cases invalidating similar restrictions because it finds

[4] By citing cases that examine a forum's historical role, the majority seemingly argues a modern place, such as an interstate rest stop, is not attended with as many rights as an older one. Majority at 12-13. But these cases examine whether a type of forum has been a *traditional* public forum. *See Jacobsen v. Bonine*, 123 F.3d 1272 (9th Cir. 1997); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 494 (7th Cir. 2000). While a monorail station might not be a *traditional* public forum (even though it is akin to a bus terminal or a sidewalk—both traditional public fora) it is still a designated public forum and the same rights attach to either a traditional or a designated public forum. A forum's age, in and of itself, is immaterial: one does not lose rights simply by stepping from an old piece of sidewalk to a new one.

[5] Additionally, the regulations leave no alternative means of communication. The protestors have nowhere else to go; picketing inside the Westlake Center is strictly prohibited. The majority claims people wanting to picket can simply use another means of entering the monorail station, without explaining why Westlake's policy or the court's broad holding is inapplicable to these areas, which are encompassed within the same

Westlake's restriction "did not completely ban the signs . . . ." Majority at 27. Allowing signs is irrelevant, however, because Westlake in effect completely bans picketing by forcing all signs to be held down and close to the body where their message is invisible. One cannot picket if no one can read the message on the picket sign.

The majority fears that a "sign on a stick, held aloft, presents a safety concern, particularly in the narrow confines of an escalator." Majority at 25. Nevertheless, it upholds a ban affecting the entirety of the monorail station, even the open-spaced boarding platform that connects the station to the shopping center and the wide entrance corridor. A sign on a stick will always present some hazard, but not one great enough to justify forsaking our constitutional rights. In *United States v. Grace* the Supreme Court held maintaining order, while a significant interest, did not justify a "prohibition of carrying signs, banners, or devices on the public sidewalks surrounding the [Supreme Court building]." 461 U.S. 171, 183, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) ("We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes." *Id*. at 82.). Westlake is right to be

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easement. Majority at 27-28. Alternatively, the majority suggests petitioners can simply use the public sidewalks outside. However, telling someone to just go somewhere else to protest is not an alternative means of communication.

concerned about public safety. But this interest cannot summarily trump the right to protest and picket, and we cannot let fear of some hypothetical injury justify an abridgement of one's First Amendment rights.

Certainly, a protestor must be sure not to endanger those around him, and Westlake may take reasonable steps to make sure protestors act properly, but banning all picketing is not a reasonable step. In *Foti v. City of Menlo Park*, the Ninth Circuit held it was permissible for a city to require picketers to have small signs, since "[e]xtremely large or numerous picket signs nearby could well interfere with a bus's operation or with pedestrian circulation on the sidewalk." 146 F.3d 629, 641 (9th Cir. 1998) ("Regulations of the size and number of picket signs are permissible as long as they are 'not so restrictive as to foreclose an effective exercise of First Amendment rights.'" *Id*. at 642 (quoting *Verrilli v. City of Concord*, 548 F.2d 262, 265 (9th Cir. 1977))). That rule, the court held, did not pose a significant burden on the appellants' ability to communicate their message because "a substantial portion of [the] intended audience, could see and read their three square foot signs." *Id.* There is no chance a substantial portion of Sanders' or the Daugaards' intended audience will be able to see and read signs "carried low to the ground and close to the body." While Westlake's other regulations requiring signs be held safely and not block other passengers may be arguably reasonable, this one is not.[6]

[6] Additionally, the *Foti* court noted, "A picketer who uses a sign to block traffic or obscure drivers' views may also be cited under existing ordinances or other traffic laws. A

Neither Sanders nor Daugaard caused any disruption, delay, or other problem. Sanders simply waited patiently in line, while the Daugaards calmly exited the station, all while holding protest signs. Such is their right.

picketer who harasses or assaults passersby may be cited for disturbing the peace or charged with assault. Obvious, less burdensome means for achieving the city's aims are readily and currently available by employing traditional legal methods." 146 F.3d at 642. Similarly, Westlake and the City of Seattle have myriad options available to maintain public safety and order.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: